IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE K.PADMANABHAN NAIR

WEDNESDAY, THE 13TH JUNE 2007 / 23RD JYAISHTA 1929

AS.No. 484 of 1994()

OS.411/1989 of PRINCIPAL SUB COURT, PALAKKAD

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APPELLANT:

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1. MANI, D/O VARIYATHKALATHIL VELU
   RESIDING AT PRADHANI, VADAKKENCHERRY AMSOM
   ALTHUR TALUK, PALAKKAD DISTRICT

2. LAKSHMIKUTTY (MINOR) D/O MANI,
   RESIDING AT PRADHANI, VADAKKENCHERRY
   AMSOM, ALATHUR TALUK, PALAKKAD DISTRICT

3. MEENAKSHIKUTTY (MINOR), D/O MANI
   RESIDING AT PRADHANI, VADAKKENCHERRY AMSOM
   ALATHUR TALUK, PALAKKAD DISTRICT

(MINOR APPELLANTS 2 AND 3 REPRESENTED BY THEIR GUARDIAN FATHER 4TH APPELLANT)

4. CHINNAPPA NAICKAN, RESIDING AT PRADHANI
   VADAKKENCHERRY AMSOM, ALATHUR TALUK
   ALAKKAD DISTRICT

BY ADV. SRI.V.CHITAMBARESH, T.C.SURESH MENON

RESPONDENTS:

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1. MEENKSHIKUTTY AMMA D/O THIRUVARAYIL
   KURIYIL PARUKUTTY AMMA, RESIDING AT
   KOTTAPARAMBIL, KAVASSERI AMSOM, ALATHUR TALUK
   PALAKKAD DISTRICT

2. DEVAKI D/O MEENAKSHIKUTTY AMMA
   RESIDING AT KAMRAJ NAGAR, AVADI
   MADRAS

3. VELUSWAMI S/O MANI RESIDING AT PRADHANI
   VADAKKENCHERRY AMSOM, ALATHUR TALUK
   ALAKKAD DISTRICT

4. VELU ALIAS VELUCHAMY, RESIDING AT
   NAIKKATHARA, KOZHINJAMPARA VILLAGE
   CHITTUR TALUK, PALAKKAD DISTRICT

BY ADV. SRI.P.N.K.ACHAN, VANAJA MADHAVAN

THIS APPEAL SUITS HAVING BEEN FINALLY HEARD ON 13/06/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

A.S NO. 484 OF 1994

ORDER IN CMP NO. 2950 OF 1994 IN M.F.A. A.S NO. 484 OF 1994

DISMISSED

13-6-2007 SD/- K.PADMANABHAN NAIR, JUDGE

ORDER IN CMP NO. 926 OF 1996 IN A.S. NO. 484 OF 1994

DISMISSED

13-6-2007 SD/- K.PADMANABHAN NAIR, JUDGE

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K.PADMANABHAN NAIR . J.

A.S No. 484 of 1994

Dated this the 13th day of June 2007

JUDGMENT

Defendants 1,2,3,4 & 6 in O.S. 411/1999 on the file of the Subordinate Judge's Court are the appellants. The suit was for partition and separate possession of the share of the plaintiffs. The appeal is filed against the preliminary decree passed by the Court below declaring the share of the plaintiffs' in the suit properties. According to the plaintiffs the suit property originally belonged to a common thavazhi as per a registered partition deed No.2546/1993. The karanavan of the thavazhi was one Madhavan Nair who was the uncle of the plaintiffs 1 &2. He was managing the property for and on behalf of the thavazhi. He died in the year 1988. It was averred that the said Madhavan Nair bequeathed his share in the properties to the defendants under a will. It was averred that at the time of the death of Madhavan Nair he had only $^1/_3$ right in the plaint schedule properties and hence the plaintiffs are entitled to get the remaining $^2/_3$ share in the suit properties . Defendants 1,3, and 4 filed a joint written statement contending that the suit is not maintainable. According to them the plaint schedule properties were set apart towards the share of Madhavan Nair. That property was enjoyed by Madhavan Nair separately. It was also contended that the properties allotted to the plaintiffs were sold to Parangodan Appukkutty Master and others by means of sale deeds. It is further contended that the rights of Madhavan Nair on

the plaint schedule properties devolved on defendants 1 to 4 under the will. It was contended that the plaintiffs are not entitled to any share. Subsequently they filed additional written statement contending that if the court finds that there was no oral partition as regards the plaint schedule properties the suit is bad for partial partition. So the suit is liable to be dismissed.

2. The trial court found that the suit is maintainable. It was also found that the plaintiffs are entitled to $^2/_3$ shares. A preliminary decree allowing the partition of $^2/_3$ shares to the plaintiffs was passed . Challenging that preliminary decree this appeal is filed.

3. The learned counsel appearing for the appellants has argued that the finding of the court below that the suit properties are liable to be partitioned is illegal . It is argued the Court ought to have found that there was oral partition and the properties allotted to the share of the plaintiffs were sold to Parangodan Appukkutty Master and others and as such respondents 1 and 2 have no subsisting right over the suit properties on the date of the suit. It is also contended that in view of the certificate of purchase obtained by the appellants the rights if any of the appellants are lost.

4. Ext.B1 partition deed dated 20-12-1973 shows that there was partition in the tarwad of Madhavan Nair and the suit properties were allotted to the thavazhi share of the plaintiffs and deceased Madhavan Nair. In Ext.B1 it was stated that Madhavan Nair and respondents 1 & 2 formed a thavazhi and the plaint schedule properties allotted to them.

So the stand taken by the defendants that Madhavan Nair had absolute and exclusive title over the suit properties is without any merit. He was having $^1/_3$ right over the properties. So the will executed by Madhavan Nair will take effect only in respect of his share in the property. The appellants have no case that in Ext.B3 proceedings notice was issued to the other members of the thavazhi . It is trite law that a certificate of purchase obtained without due notice persons having right over the property is not binding on them. It is also settled law that an assignee from a co-owner is also a co-owner. Though a contention was raised that there was oral partition in the thvazhi that contention was not proved. To prove the oral partition the appellants examined as DW 1 & 2 . The trial Court who had occasion to watch the demeanour of those witnesses had chosen not to believe them. The appellants had raised a contention that all properties of Madhavan Nair were not included in the suit. Even according to the appellants those properties were alienated by Madhavan Nair during his life time as evidenced by Ext.B4. So the contention that the suit was bad for partial partition is also without any merit. So the finding of the Court below that the defendants have $^2/_3$ share in the suit properties is correct and does not call for any interference. The appeal has no merit and the same is only to be dismissed.

In the result the appeal is dismissed.

sd/-

K.PADMANABHAN NAIRJUDGE

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